BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY J. CHRISCO Claimant	)	
VS.	)	Docket No. 1,035,942
WAYNE R. WARD Uninsured Respondent	)	
TIMOTHY J. CHRISCO Claimant	)	
VS.	)	Docket No. 1,036,471
ESTATE OF WAYNE R. WARD Respondent AND	)	
TRAVELERS INDEMNITY CO. Insurance Carrier	)	

ORDER

Travelers Indemnity Company (Travelers) requests review of the November 26, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Following a preliminary hearing held in both above-referenced docketed claims, the Administrative Law Judge (ALJ) issued an order that found as follows:

> The evidence is clear the claimant suffered two compensable accidents. It is less clear as to which accident necessitated treatment. It is not necessary for the Court to determine which accident has caused the present need for treatment.[1]

The ALJ went on to conclude that respondent was responsible for providing medical treatment and temporary partial disability benefits. The ALJ's Order also includes the following directive:

> In order to insure that benefits are promptly paid, the Court orders that all benefits awarded shall be paid by Travelers Insurance. After these have been paid, the estate of Wayne Ward shall reimburse Travelers for ½ of such benefits, upon presentation of documentation that the benefit has been paid. The ultimate issue of which party is responsible shall be addressed at the regular hearing.[2]

Respondent's carrier, Travelers[3], appealed this Order in Docket No. 1,036,471 only, asserting that claimant failed to establish that he sustained an injury that arose out of and in the course of his employment with respondent. Moreover, Travelers contends claimant's physical complaints and present need for treatment are attributable to a preexisting condition or claimant's earlier accident on July 19, 2007 for which respondent was uninsured. And that if claimant indeed sustained an aggravation of his condition, his second accident date is, pursuant to K.S.A. 44-508(d), August 7, 2007, a date that predates Traveler's coverage.[4]

Jeffrey King, counsel for respondent and its carrier Travelers, argues that the claimant was in need of medical care for his low back and radiating pain well before he began working for respondent. And that his present need for treatment is causally related to his preexisting condition or to his first accident while working for respondent which occurred on July 19, 2007, while his client was uninsured.

Respondent's counsel in Docket No. 1,035,942, the claim in which respondent is uninsured, as well as claimant urge the Board to affirm the ALJ's tentative legal conclusions as to the respondent's responsibility in each of these claims.

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[1] ALJ Order (Nov. 26, 2007) at 1.

[2] *Id.* at 2.

[3] Travelers has its own counsel in this matter in light of the potential coverage dispute. Travelers, individually, is represented by Bill Townsley and it is this entity that has appealed the preliminary hearing Order. Respondent and its carrier are represented by Jeff King. Respondent James R. Ward, now deceased, is represented by Mickey Mosier.

[4] Coverage commenced August 14, 2007.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Both claimant and respondent (along with its carrier) acknowledge that claimant had undergone surgery to his low back in 2005. After that surgery, claimant was released and he went on to work in the construction industry. In July 2006, claimant noticed an increase in low back pain and the onset of left leg pain. Claimant sought treatment with Dr. Coleman who referred him to Dr. Manguoglu, a neurosurgeon, for an evaluation. In October 2006, Dr. Manguoglu performed surgery. According to claimant he had no follow up for that surgery until July 2007, when he noticed that he was having increased low back pain along with some swelling and bleeding from his incision site. Claimant returned to see Dr. Coleman on July 10, 2007 noting these complaints. A MRI was recommended but not performed as claimant had no insurance and because he testified he was busy at work.

Thereafter, claimant alleges he sustained two accidents, the first on July 19, 2007 and the second on August 16, 2007. Both accidents happened in the same manner and involve an activity, schooling a large number of greyhounds, that claimant engages in at least two times a week. Claimant testified that he was in the process of removing greyhounds from their carriers when one dog jumped and pulled him, causing him to twist his back and fall to his knees or to the ground. Claimant explained that he felt his back "go out".[5] Both instances were witnessed and corroborated by a claimant's supervisor, Mitch Veal.

The first time this happened, it was July 19, 2007. Claimant took a moment to gather himself and then went ahead and worked the rest of his day. But he continued to notice an increase in low back pain along with pain in his left leg. Claimant advised Julia Ward of his accident and he was referred to her own doctor as she disclosed that she did not have workers compensation insurance. Claimant's first doctor's visit was July 27, 2007 and at his employer's request claimant underwent a functional capacities evaluation.

In the meantime, respondent acquired workers compensation insurance, effective August 14, 2007.

In spite of his first accident, claimant continued working for respondent at his normal job duties. Again, on August 16, 2007, claimant described a similar event with a dog jumping out of a kennel, knocking him back. Then, on August 19, 2007, claimant went to the emergency room with back pain complaints and told Mr. Veal that he would not be in to work on Monday because he hurt his back. According to claimant, this second accident which caused his pain to be permanently worse is in much the same area as before.

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[5] Claimant's Depo. at 18.

Since that time claimant has received only conservative treatment. His ability to work was restricted and respondent has accommodated claimant's limitations.

Respondent (individually in the first docketed claim) admits claimant suffered injury on July 19, 2007, but asserts that claimant suffered a re-injury on August 16, 2007, which permanently aggravated his condition. Thus, as a result of the intervening accident, any liability falls on the August 16, 2007 accident.

Both respondent and its carrier (in the second docketed claim) deny any accident occurred while claimant was working on August 16, 2007 and further contend that if there was any such incident, claimant did not suffer an injury as a result of that event. Rather, any complaints claimant has or any need for treatment predates August 16, 2007. Moreover, respondent and Travelers contend that given the nature of claimant's job duties and his alleged accident, claimant's date of accident is August 7, 2007, the date restrictions were imposed by Dr. Biggs, the authorized physician. For all of these reasons, Travelers contends that it is not responsible for claimant's accident, if indeed it is found that one occurred.

The ALJ concluded that claimant sustained two separate accidents, a finding that is fully supported by the evidence. Both claimant and his supervisor, Mr. Veal, testified to acute accidents that occurred on July 19, 2007 and August 16, 2007. This Board Member agrees with the ALJ's conclusions in this respect. It is uncontroverted that on both those days claimant was performing his work duties when a dog unexpectedly jumped from a kennel, causing claimant to twist his back. In both instances claimant temporarily stopped working and had to collect himself in order to continue working. In both instances he experienced an onset of pain in his back and in his right leg. Based upon this evidence and the lack of anything to the contrary, the Board finds the ALJ's factual findings are affirmed. Claimant is found to have sustained an accidental injury arising out of and in the course of his employment on July 19, 2007 and on August 16, 2007.

In the second docketed claim, respondent, individually and through its carrier, suggest that the "legal" date of claimant's second accident is August 7, 2007, the date that the designated physician imposed restrictions. This argument stems from a recent change in the law as it relates to cases involving microtraumas, also referred to as repetitive injuries. Although claimant has pled this second claim as an acute injury, respondent and its carrier suggest that his injury is more in the vein of a repetitive injury as his job duties involved schooling the dogs twice a week, loading and unloading over a hundred dogs each time. Obviously, respondent's carrier hopes to establish an accident date that predates the effective date of its coverage period, that being August 14, 2007. This argument was not addressed by the ALJ in his Order thus it is unclear if he was unpersuaded by the argument or if he chose to disregard it altogether.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma

cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[6] (Emphasis added.)

Based on the facts contained within the record as it is presently developed, this Board Member finds that claimant's injury is not repetitive in nature. Rather, he sustained two separate acute injuries. Accordingly, the above-referenced statute does not apply and the ALJ's findings as to two separate dates of accidents, one for which respondent is not insured and the other for which Travelers is responsible, is affirmed.

Having concluded that claimant sustained his burden of proof on both acute accidents, this member further concludes the balance of the ALJ's Order should be affirmed as well. Implicit in the ALJ's Order is a finding that one or both of these accidents contributed to claimant's present need for treatment. Had that not been the case, then he would not have had the authority to issue an order compelling respondent to pay for medical treatment. What the ALJ did was to ensure that claimant, who had been injured in two acute accidents, receives the treatment he now requires. And the ALJ reserved the issue of precisely how to apportion the liability as between the respondent individually, and its carrier. Thus, the ALJ's conclusion that respondent *and* the carrier are responsible for claimant's medical treatment, with Travelers paying for that treatment and looking to respondent for reimbursement of half of that cost, is affirmed.

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[6] K.S.A. 2005 Supp. 44-508(d).

It is worth noting that there is some confusion in the pleadings and the record as to the proper parties and the identity of a carrier. The ALJ's caption indicates that there are two insurance carriers involved in this matter. From the information contained within the record, it appears that only Travelers is the appropriate insurance company in Docket No. 1,036,471. That aspect of this matter should be clarified. In addition, it now appears that Wayne R. Ward, the individual respondent identified in both claims is now deceased and was actually deceased at the time of both accidents. And it would also appear that an estate has been opened. Mr. Mosier has filed a pleading indicating that he is counsel for the Estate but the transcript from the Preliminary Hearing would suggest otherwise. And none of the Applications for Hearing contain a reference to the Estate of Wayne R. Ward but the ALJ's Order does reference that entity as the respondent. The parties are asked to clarify this matter before this claim proceeds so that the appropriate respondent is identified.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[7] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated November 26, 2007, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Mickey W. Moiser, Attorney for Respondent
Jeffrey E. King, Attorney for Respondent
William L. Townsley, Attorney for Travelers Indemnity Company
Bryce D. Benedict, Administrative Law Judge

[7] K.S.A. 44-534a.